Supreme Court, U.S.
FILED
OCT 31 2008
OFFICE OF THE CLERK

No. 08-41

In The
Supreme Court of the United States

WILLIAM DUPRE,
Petitioner,

v.

TELXON CORPORATION and
SYMBOL TECHNOLOGIES, INC.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR REHEARING

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Oct. 31, 2008

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PETITION FOR REHEARING

Pursuant to Rule 44.2, Petitioner William Dupre respectfully petitions this Court for a rehearing of its decision denying Dupre's Petition for a Writ of Certiorari. Dupre petitions this Court on the grounds that *Caperton v. A.T. Massey Coal Co., petition for cert. filed*, Case No. 08-22 (U.S. July 2, 2008) has been reset for a third conference. The questions presented for review by Dupre's Petition for a Writ of Certiorari and Caperton's Petition for a Writ of Certiorari are nearly identical. Accordingly, if this Court were to issue a writ of certiorari in *Caperton*, that event would constitute an intervening circumstance of substantial or controlling effect that would warrant a rehearing of Dupre's Petition for a Writ of Certiorari.[1]

I. The Questions Presented by *Dupre v. Telxon, petition for cert. filed*, Case No. 08-41 (U.S. July 7, 2008) and *Caperton v. A.T. Massey Coal Co., petition for cert. filed*, Case No. 08-22 (U.S. July 2, 2008) are identical, integral to a functional Due

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[1] This Court denied Dupre's Petition for a Writ of Certiorari on October 6, 2008, after the September long conference. Accordingly, Dupre's time for filing his Petition for a Rehearing was set to expire on October 31, 2008. *Caperton* was reset for conference for October 31, 2008. Dupre was therefore faced with the proverbial "no win" situation. Dupre could either file his Petition for Rehearing before the Court issued a decision in *Caperton* or allow the allotted time for filing to expire. Because this Court is now entertaining the *Caperton* Petition in conference for the third time, there is good reason to believe it will grant the Petition for a Writ of Certiorari in that case.

Process Clause, and both cases should be heard together.

In his Petition for a Writ of Certiorari, Hugh M. Caperton presented the following question for review:

> Justice Brent Benjamin of the Supreme Court of Appeals of West Virginia refused to recuse himself from the appeal of the $50 million jury verdict in this case, even though the CEO of the lead defendant spent $3 million supporting his campaign for a seat on the court - more than 60% of the total amount spent to support Justice Benjamin's campaign – while preparing to appeal the verdict against his company. After winning election to the court, Justice Benjamin cast the deciding vote in the court's 3-2 decision overturning that verdict. *The question presented is whether Justice Benjamin's failure to recuse himself from participation in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment.*

Caperton Pet. at i (emphasis added).

In his Petition for a Writ of Certiorari, Dupre presented the following question for review: "Whether there are any circumstances under which a party litigant's exorbitant campaign contributions, made to the presiding judge and/or justice, while the matter is pending, can violate the opposing party's right to an impartial tribunal." Dupre Pet. at i. Not only do both cases bear strikingly similar questions presented, the

legal issues and facts arising from the cases share a strong resemblance.

In Dupre's case, the majority issued the following recitation of the facts:

> Robert F. Meyerson, a one-time Chairman and CEO of Telxon, held an ownership interest through himself and/or his "affiliates" in the amount of 7.6 million dollars as of mid-January 2000. Appellees allege that Meyerson was not only a key witness in the case but also Judge Batchelder's largest and long standing contributor. At a time when Meyerson is said to have known about the pending litigation – as early as the spring of 2000 – Meyerson donated $50,000 to the Republican Party of Summit County. A battery of additional donations in the fall of 2000 is listed in the respective chronological amounts of $50,000, $110,000, $100,000, and $25,000, so that, all in all, Meyerson donated $335,000 to the county party during the calendar year 2000. (In October 2000 the party itself contributed $20,000 to Judge Batchelder's judicial campaign). During the year 2001, Meyerson donated an additional $202,500 to the county party. And in 2003, Meyerson donated $55,000 to the county party, earmarking $50,000 for the "Judicial Fund." Also, for his 1996 campaign for the Ohio House of Representatives – prior to his elevation to the bench – Judge Batchelder allegedly received $15,000 from Meyerson, visited Meyerson at Meyerson's home to solicit the contribution and later entertained Meyerson at his (Batchelder's)

> home following receipt of the political contribution. That sum - $15,000 – is described as nearly one third of the total funds raised for Batchelder's House campaign for that election cycle.

Dupre Pet. App. at 5a.

Dupre's case and the *Caperton* matter both contain fact patterns involving exorbitant campaign contributions from appellants to the judges and/or justices who eventually overturned multi-million dollar verdicts. As a result, the dissenting judges/justices in both cases voiced the same constitutional concerns. In Dupre's case the dissent noted that the decision penned by the majority could not pass constitutional scrutiny under this Court's precedent:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to average man as a judge...not to hold the balance, nice, clear and true between the State and the accused denies the latter due process of law.

> Such a stringent rule may sometimes bar trial by judges who have not actual bias and who would do their very best to weight the scales of justice equally between contending parties. But, to perform its high function in the best way 'justice must satisfy the appearance of justice.'

Dupre Pet. App. at 11-12a, *citing Tume v. Ohio,* 273 U.S. 510, 532 (1927), *In re Murchison*, 349 U.S. 133, 136 (1955); *and, Offutt v. United States*, 348 U.S. 11, 14 (1954).

In *Caperton,* the dissent concluded that the same due process issues existed: "Upon reviewing the cases of *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986) and *In re Murchison*, 349 U.S. 133, 136 (1955),... it is clear that both actual and apparent conflicts can have due process implications on the outcome of cases affected by such conflicts." Caperton Pet. App. 146a, n.16. The similarity between the two cases was also observed by the *Amici Curiae* in *Caperton*.

After having reviewed both the Caperton and Dupre Petitions, *Amicus Curiae* Public Citizen urged this Court to grant certiorari in both matters. *Caperton, Brief of Amicus Curiae Public Citizen, filed*, (U.S. Aug. 4, 2008) at 2-3. *Amicus Curiae* The American Bar Association argued that "public confidence is being eroded by activities such as those at issue in this case and others like it." *Caperton, Brief of Amicus Curiae Public Citizen, filed*, (U.S. Aug. 4, 2008) at 7, n. 10. "The most recent example is *Dupre v. Telxon Corp.*" *Id.* That these two cases share the same constitutional questions is not the product of

wishful thinking by a litigant, but the objective observation held by numerous parties.

Where this Court has granted certiorari in favor of a subsequent petition, after having previously denied certiorari based on the same question presented, it has not hesitated to vacate the prior order and grant a petition for rehearing. *See, e.g., Boumedien v. Bush,* 127 S. Ct. 3078 (2007), *Odah v. United States*, 127 S. Ct. 3067 (2007), *Soto v. United States,* 543 U.S. 1117 (2005). This Court has also elected to vacate the order denying certiorari, hold the similar case, and then remand with instructions that the case be decided in accordance with the holding of the similarly situated matter. *See, Capital Area Right to Life v. Frankfurt*, 511 U.S. 1135 (1994) (O'Connor dissenting). In the event that this Court grants certiorari in *Caperton*, the Ohio Supreme Court should at least have the opportunity to revisit its decision in *Dupre* in light of the Court's ruling in *Caperton*. For if this Court grants certiorari in *Caperton* and does not vacate its denial of certiorari in *Dupre*, Dupre will be forever barred from seeking a remedy to the constitutional violation he suffered below.

CONCLUSION

For the foregoing reasons, Dupre respectfully requests that this Court grant his Petition for Rehearing and either grant certiorari or hold his case until such time as a final decision in *Caperton* has been reached.

Respectfully submitted,

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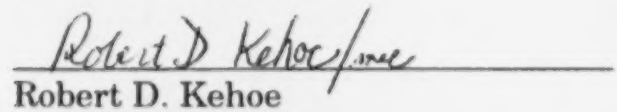
The foregoing Petition for Rehearing is restricted to the grounds specified in S. Ct. R. 44.2, and it is presented in good faith and not for purposes of delay.

Respectfully submitted,



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